84TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { No. 1051

AMENDING THE COMMUNICATIONS ACT OF 1934 IN REGARD TO PROTESTS OF GRANTS OF INSTRUMENTS OF AUTHORIZATION WITHOUT HEARING

JULY 1, 1955.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. PRIEST, from the Committee on Interstate and Foreign Commerce, submitted the following

REPORT

[To accompany H. R. 5614]

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (H. R. 5614) to amend the Communications Act of 1934 in regard to protests of grants of instruments of authorization without hearing, having considered the same, report favorably thereon with amendments and recommend that the bill do pass.

The amendments are as follows:

Page 2, line 13, after the word "Commission" insert ", after affording protestant an opportunity for oral argument,".

Page 2, line 16, after the word "Commission" insert:

may in such decision redraft the issues urged by the protestant in accordance with the facts or substantive matters alleged in the protest, and

Page 2, line 24, substitute the word "facts" for the word "matters".

Page 2, line 25, substitute the words "adopted or specified" for the words "specifically adopted".

Page 2, line 25, after the word "Commission," insert: "on its own motion,".

PURPOSE OF LEGISLATION

This bill is intended to amend section 309 (c) of the Communications Act of 1934 so as to prevent the abuse of the protest procedure, provided for therein, by persons who are primarily concerned with the furtherance of their own private economic interest, and who are in a position to use the existing provisions of the section to delay the institution of radio or television services which the Federal Communi-

cations Commission, without a hearing, has approved as being in the public interest. The bill intends to accomplish this purpose by—

(1) Eliminating the necessity for holding full evidentiary hearings with respect to facts alleged by a protestant which, even if proven to be true, would not constitute grounds for setting aside the grant which the Commission has made; and

(2) Giving the Commission some discretion to keep in effect the authorization being protested where the Commission finds that the public interest requires the grant to remain in effect.

NEED FOR LEGISLATION

Section 309 (c), which permits any "party in interest" to protest radio and television authorizations granted by the Commission without hearing, was enacted into law by the Communications Act amendments, 1952.

Congress, in enacting section 309 (c), attempted to provide a means whereby any "party in interest" would have an opportunity to obtain a hearing before the Commission where he raises legitimate *putlic interest* considerations which indicate that the authorization granted should not have been made. In addition, the section was designed to maintain the *status quo* while the Commission held a hearing on the issues raised in the protest. If the Commission finds that the protestant is a "party in interest" and that he has specified with particularity the facts, matters, and things which be relies upon, the statute requires that the application involved must be set for hearing on the issues set forth in the protest, as well as upon any other issues specified by the Commission. Pending the hearing and the Commission's decision on the protest, the Commission is *required* to postpone the effective date of the authorization which it has granted, unless the Commission finds that the authorization involved is necessary to the maintenance or conduct of an *existing* radio or television service. In the latter event, this section authorizes the Commission to permit the authorization protested to remain in effect pending the Commission's decision after a hearing.

The protest provision has now been in effect for almost 3 years. On the basis of the experience with the existing provisions of the section, as presented during the hearings on this bill by the Federal Communications Commission as well as the other witnesses, including broadcasters and representatives of the Federal Communications Bar Association, your committee is convinced of the necessity for amending section 309 (c).

Two factors in particular necessitate the making of changes.

First, court interpretations of section 309 (c) have created considerable doubt whether the Commission now has the authority to dispose of *any* protest without holding a full evidentiary hearing, once the protestant has shown himself to be a party in interest and has detailed his objection to the grant. Thus, a full evidentiary hearing may now be required although the facts alleged in the protest, even if true, would not be grounds for setting aside the grant. This results in a considerable and useless administrative burden on the Commission.

Second, except in the case of an already existing service, the provisions of section 309 (c) make it mandatory for the Commission to stay the effectiveness of the protested grant pending the outcome of

the full evidentiary hearing. As a result of such a stay the public may be deprived unnecessarily for a prolonged period of time of a new radio or television service.

Third, the situation resulting from the first two factors is aggravated further by reason of the fact that broad classes of persons have standing as "parties in interest" to file protests. Not only may radio and television licensees protest grants of radio or television authorizations, respectively, but radio licensees may protest television grants and vice versa television licensees may protest radio grants, and even newspapers without radio interests which have alleged a threat of economic injury may protest radio or television grants. In many of these cases the protests are based on grounds which have little or no relationship to the public interest.

While the classes of persons who have standing as "parties in interest" to file protests are very broad, the committee believes that the continuance of abuses of section 309 (c) can be curbed by the amendments to section 309 (c) proposed in this bill without attempting to limit such classes of persons.

In order to meet the first factor mentioned above, the committee recommends that the statute be amended to make it perfectly clear that the Commission has the authority to dispose of protests without holding a full evidentiary hearing where the Commission finds that the facts alleged in the protest, even if proven true, would not constitute grounds for setting aside the grant being protested. This would give the Commission authority to demur to any or all of the issues raised by the protestant, and would be similar to a court's authority to issue a summary judgment in appropriate proceedings. This would serve to protect the public interest and to prevent the statute from being used merely as a vehicle to delay the institution of a competitive service.

In order to meet the second factor mentioned above, the committee recommends that section 309 (c) be amended so as to empower the Commission, even where a full evidentiary hearing is ordered, to continue the protested authorization in effect if the Commission affirmatively determines that the public interest so requires and sets forth in its decision the reasons for such determination.

EXPLANATION OF COMMITTEE AMENDMENTS

The committee has amended the bill to provide that the Commission shall afford the protestant an opportunity for oral argument before it may eliminate as insufficient any issue which has been raised. This amendment was proposed during the hearings on the bill by the Federal Communications Bar Association. The Commission has indicated that it has no objection to this requirement being written into the statute.

Under the existing statute there has been some doubt as to the Commission's authority to redraft the issues specified by the protestant in his protest. Such authority to redraft the issues is considered necessary since those set forth by the protestant may not accurately reflect the facts alleged in the protest and may include matters which are irrelevant to a determination as to whether the grant in question is in the public interest. The committee has amended the bill so as to (1) spell out the right of the Commission to redraft issues based on

the facts alleged in the protest, and (2) make it clear who has the burden of proof with respect to the issues in a protest hearing. The Commission has agreed to these changes, which were proposed by the Federal Communications Bar Association.

FEDERAL COMMUNICATIONS COMMISSION,
Washington 25, D. C., March 21, 1955.

Hon. SAM RAYBURN,
Speaker of the House of Representatives,
Washington 25, D. C.

DEAR MR. SPEAKER: The Commission wishes to recommend for the consideration of the Congress a proposed amendment to section 309 (c) of the Communications Act of 1934, as amended. A proposed bill is attached as an appendix to this letter. The objective of the proposed legislation is to clarify the so-called protest rule contained in section 309 (c) which was incorporated into the Communications Act by the Communications Act Amendments, 1952 (66 Stat. 711), so as to obviate the use of the new procedure as a device for delaying radio station grants which are in the public interest while at the same time retaining the rule's primary objective of providing interested parties with a means by which they may bring to the Commission's attention bona fide questions concerning grants made without hearing. The Commission proposed a bill to amend section 309 (c) in the 83d Congress. It was introduced in that Congress as H. R. 7795, but no action on the bill was taken.

Section 309 (c) now provides that all authorizations granted without a hearing shall remain subject to protest by any "party in interest" for a 30 day period. The protest must show that the protestant is a party in interest and must specify with particularity the facts relied on to sustain the protest. Within 30 days from the date of filing of a protest, the Commission must determine whether the protest meets these requirements. If the Commission so finds, it is directed to set the application involved for hearing on the issues specified in the protest as well as such additional issues as the Commission may prescribe. The protestant has the burden of proof and the burden of proceeding with the evidence on issues set forth in his protest and not specifically adopted by the Commission. The Commission is directed to expedite protest hearing cases, and the effective date of the Commissions' action protested is to be postponed until the Commission's decision after hearing, unless the particular authorization is necessary to the maintenance or conduct of an existing service.

The protest rule has resulted in substantial delays in the construction and operation of new television or radio stations authorized by the Commission without hearing. For any "party in interest" may file a protest and the term "party in interest" has been held by the courts to include existing stations in the same service as the grantee who might be adversely affected economically by the grant. In addition, relevant court decisions appear to indicate that stations in other services or other persons who might suffer economic injury as a result of competition afforded by the new stations would be parties in interest entitled to protest. Furthermore, if the protestant shows himself to be a party in interest and details his objections to the grant, one interpretation of the present statute is that the Commission is required to designate the application for hearing on the issues specified in the protest and cannot dispose of the protest, as on demurrer, on the pleadings. The Commission has taken the position that where it finds that the matters raised by the protest would not require the grant to be set aside, even if the factual allegations are assumed to be proven, the protest may be disposed of on the pleadings or, where substantial legal questions are involved, after oral argument on the legal issues, without designating the application for a full evidentiary hearing. However, it is recognized that the present language of section 309 (c) leaves in doubt the Commission's authority to dispose of a protest on the basis of the pleadings or after oral argument. It is believed that the statute should be amended so as to make clear that the Commission has authority to demur to the pleadings, in order to insure that it would not be necessary to hold evidentiary hearings which could serve no useful purpose and which would therefore be contrary to the public interest by delaying the initiation of a new or improved radio service. Such hearings, it should be indicated, not only delay the effectiveness of the particular authorization involved but also occupy the time and efforts of members of the Commission's limited staff who could otherwise be utilized in connection with other proceedings, including necessary hearings involving competitive television applications.

There is also some question under the present language of section 309 (c) as to whether the Commission must, in designating a protest for hearing, include the precise issues which the protestant has set forth regardless of the manner in which such issues have been drafted by the protestant. The Commission has held that where the protestant's issues are drawn too broadly or include matters not covered by the facts relied on, it has the authority to redraft the issues to reflect accurately the substantive matters raised in the protest. Here again, however, the Commission's authority is not entirely free from doubt, and a clarifying amendment to the statute is considered appropriate.

As indicated above, the final provision of section 309 (c) makes it mandatory for the Commission, once a protest has been granted, to postpone the effective date of the Commission's action to which protest is made until the effective date of the Commission's decision after the hearing on the protest. The only exception to this mandatory stay provision is when the authorization protested is necessary to the maintenance or conduct of an existing service, in which event the Commission may authorize the use of the facilities in question pending the Commission's decision after hearing. This has required staying the effectiveness of all authorizations for new facilities when protests have been granted, despite the fact that in some instances the public interest clearly required that the authorization remain in effect and the new service be inaugurated pending the outcome of the protest hearing. It is believed that an amendment is necessary which would give the Commission discretion to deny a stay in those cases where it can find on the record that the public interest clearly requires such action.

In order to obviate these difficulties the enclosed proposal would amend section 309 (c) to make clear that while any party in interest could protest a grant of a permit made without hearing, such protest would not automatically result in staying the effectiveness of the grant or require a hearing regardless of the merits of the claims advanced by the protestant. Instead, the proposed new language would provide that within 30 days of the filing of such a protest the Commission, upon consideration of the protest, and any reply thereto, would issue a decision as to the legal sufficiency of the protest as to standing and the particularity of the matters alleged as grounds for setting aside the grant. In the event the Commission finds in the affirmative as to these matters, it would be required to designate the application for hearing upon issues relating to all matters raised in the protest, except that the Commission could exclude such matters as to which it finds that, even if the facts alleged by the protestant were proven, they would not constitute grounds for setting aside the grant. The amendment further provides that if a protest is designated for hearing, the effective date of the grant shall be postponed, unless the authorization is necessary for the continuation of an existing service, or unless the Commission affirmatively finds, for specified reasons, that the public interest requires the grant to remain in effect. It is believed that the revised language would achieve the apparent objective of the protest rule in affording interested parties an opportunity to bring to the attention of the Commission questions about grants made without hearing and to obtain a determination thereon. At the same time, it would avoid the utilization of the protest rule as a device for delay on the part of competitors.

The Commission, therefore, recommends that section 309 (c) should be amended as set forth in the attached proposed bill. The submission of this proposal to the Congress has been approved by the Bureau of the Budget. If there is any further information concerning this matter which the Commission can furnish, please do not hesitate to let us know. There are also attached the separate views of Commissioner Doerfer concerning this matter.

By direction of the Commission:

GEORGE C. MCCONNAUGHEY, *Chairman.*

SEPARATE VIEWS OF COMMISSIONER JOHN C. DOERFER

Commissioner Doerfer believes that section 309 (c) of the Communications Act should be repealed in its entirety. It is inconsistent with the philosophy of the act which seeks to provide for the public interest within the framework of competition.

"Plainly it is not the purpose of the act to protect a licensee against competition but to protect the public. Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public" (the *Sanders* case, 309 U. S. 470 (1940)).

Experience has shown that section 309 (c) demands an undue amount of Commission time, is used primarily for delay by competitors, and accomplishes no useful purpose. In effect, it creates two attorneys general to protect the public interest, the FCC, and private parties. Governmental agencies are established upon the theory that they are competent and conscientious to protect the public interest. There is no more need for two attorneys general in such matters than for two district attorneys in a criminal case.

If the Commission, through inadvertence, illegality, or impropriety, makes a grant, all that is necessary to protect the public interest is to call the Commission's attention to the facts and to submit evidence or indicate a source of probative evidence to protect the public interest. Misfeasance, if any, on the part of the Commission should be dealt with directly—not by the creation of an official kibitzer. The idea that the public should be denied a service pending selfish and self-serving maneuvers by competitors is wholly foreign to the American concept of administrative agencies. These were created primarily to expedite matters. Section 309 (c) is an obstruction to the prompt expedition of many matters before the Federal Communications Commission. To illustrate: Recently, out of 1,400 minutes of deliberation by 7 members of the Commission, 397 minutes were spent considering protest matters, or a total of 28 percent of full Commission time. This constitutes a demand for an undue proportion of time on matters which eventually prove to contribute little, if anything, to the protection of the public interest.

FEDERAL COMMUNICATIONS COMMISSION,
Washington 25, D. C., June 27, 1955.

Hon. OREN HARRIS,
Chairman, Subcommittee on Communications,
Committee on Interstate and Foreign Commerce,
United States House of Representatives, Washington 25, D. C.

DEAR CONGRESSMAN HARRIS: In accordance with your suggestion at he hearing last Friday on H. R. 5614, the Commission has consulted with the Federal Communications Bar Association in an effort to determine whether we could reach agreement on some or all of the amendments to H. R. 5614 which the bar association had suggested. I am pleased to report success in these efforts.

The Commission and the bar association have mutually agreed to accept for incorporation into H. R. 5614 the first two of the amendments suggested by the bar association and, at the same time, to eliminate as unnecessary the third and final suggestion. The effect of this agreement would be the introduction after the word "Commission" on line 13 of page 2 of the bill the following language: ", after affording protestant an opportunity for oral argument,".

In addition, following the word "Commission" on line 16 of page 2 of the bill the following language would be inserted: "may in such decision redraft the issues urged by the protestant in accordance with the facts or substantive matters alleged in the protest,".

Finally, lines 24 and 25 of page 2 of the bill would be revised by substituting the word "facts" for the word "matters" in line 24, by substituting the words "adopted or specified" for the words "specifically adopted" in line 25, and by the addition of the words "on its own motion," following the word "Commission" in line 25, so that these two lines as revised would read as follows: "with respect to issues resulting from facts set forth in the protest and not adopted or specified by the Commission on its own motion, both".

Both the Commission and, I understand, the bar association agree that the bill as so amended would go a long way toward eliminating the primary abuses in the protest procedure which have become evident in recent years. While Commissioner Doerfer would still prefer the complete repeal of section 309 (c), as suggested in this separate testimony, he has authorized me to state that he believes the two amendments to H. R. 5614, which were agreed to by both the Commission and the bar association, are, in his opinion, proposals which at least go in the right direction.

I wish to assure you that the Commission and its staff stand ready to give your committee such further assistance in connection with this legislation as it may desire.

Sincerely yours,

GEORGE C. MCCONNAUGHEY, *Chairman.*

FEDERAL COMMUNICATIONS BAR ASSOCIATION,
Washington, D. C., June 27, 1955.

Hon. OREN HARRIS,
Chairman, Subcommittee on Communications,
Interstate and Foreign Commerce Committee,
House of Representatives, Washington 25, D. C.

DEAR CONGRESSMAN HARRIS: I understand that Chairman McConnaughey of the Federal Communications Commission is today sending you a letter reflecting the agreement which has been reached between the Federal Communications Bar Association and the Federal Communications Commission with respect to certain amendments to H. R. 5614 which had been proposed by the bar association. I was informed of the contents of this letter prior to its submission, and am happy to state that it correctly reflects the position and attitude of the bar association on this matter.

We feel, as does the Commission, that H. R. 5614 as amended will avoid any serious possibility of the protest procedure being abused in the future while at the same time affording adequate protection to interested persons who have bona fide matters to bring to the Commission's attention. And, like the Commission, the bar association stands ready to afford your committee such additional help concerning this matter as it may desire.

Sincerely yours,

PERCY H. RUSSELL, Jr., *President.*

CHANGES IN EXISTING LAW

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as introduced, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

SUBSECTION (c) OF SECTION 309 OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED

(c) When any instrument of authorization is granted by the Commission without a hearing as provided in subsection (a) hereof, such grant shall remain subject to protest as hereinafter provided for a period of thirty days. During such thirty-day period any party in interest may file a protest under oath directed to such grant and request a hearing on said application so granted. [Any protest so filed shall contain such allegations of fact as will show the protestant to be a party in interest and shall specify with particularity the facts, matters, and things relied upon, but shall not include issues or allegations phrased generally. The Commission shall, within fifteen days from the date of the filing of such protest, enter findings as to whether such protest meets the foregoing requirements and if it so finds the application involved shall be set for hearing upon the issues set forth in said protest, together with such further specific issues, if any, as may be prescribed by the Commission.] *Any protest so filed shall be served on the grantee, shall contain such allegations of fact as will show the protestant to be a party in interest, and shall specify with particularity the facts relied upon by the protestant as showing that the grant was improperly made or would otherwise not be in the public interest. The Commission shall, within thirty days of the filing of the protest, render a decision making findings as to the sufficiency of the protest in meeting the above requirements; and, where it so finds, shall designate the application for hearing upon issues relating to all matters specified in the protest as grounds for setting aside the grant, except with respect to such matters as to which the Commission finds, for reasons set forth in the decision, that, even if the facts alleged were to be proven, no grounds for setting aside the grant are presented. The Commission may also specify in such decision that the application be set for hearing upon such further issues as it may prescribe, as well as whether it is adopting as its own any of the issues resulting from the matters specified in the protest.* In any hearing subsequently held upon such application [all] issues specified by the Commission *upon its own initiative or adopted by it* shall be tried in the same manner provided in subsection (b) hereof, but with respect to [all] issues *resulting from matters* set forth in the protest and not specifically adopted by the Commission, both the burden of proceeding with the intro-

duction of evidence and the burden of proof shall be upon the protestant. The hearing and determination of cases arising under this subsection shall be expedited by the Commission and pending hearing and decision the effective date of the Commission's action to which protest is made shall be postponed to the effective date of the Commission's decision after hearing, unless the authorization involved is necessary to the maintenance or conduct of an existing service, *or unless the Commission affirmatively finds for reasons set forth in the decision that the public interest requires that the grant remain in effect*, in which event the Commission shall authorize the applicant to utilize the facilities or authorization in question pending the Commission's decision after hearing.

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